

REMARKS/ARGUMENTS

This case has been carefully reviewed and analyzed in view of the Official Action dated 10 August 2004. Responsive to the rejections made in that outstanding Official Action, Claims 1-4 have been amended so as to more clearly articulate the inventive concept of the subject Application system and thereby distinguish the present invention from the prior art cited by the Examiner. No new matter has been introduced.

The Examiner rejected Claims 1 – 7 under 35 U.S.C. § 112 for being “generally narrative and indefinite” and “... replete with grammatical and idiomatic errors.” Applicant submits herein Claims 1 – 7, amended to conform to current U.S. practice, that incorporate corrections to the grammatical and idiomatic errors as well as to the misspelled “extomopathogenic” term. By correcting these non-substantive expressions of the Applicant’s inventive concept as articulated in the seven claims, Applicant believes the Examiner’s 35 U.S.C. § 112 rejection is successfully overcome.

The Examiner also rejected Claims 1 – 7 under 35 U.S.C. § 103(a) as being unpatentable over Stimac (U.S. 6,280,723) in view of Mitchell, et al. (U.S. 4,873,112). The Stimac reference is directed to a use of a composition comprising an assertedly entomopathogenic species *Beuveria bassiana* for controlling termites. The Mitchell reference is directed to fruit concentrate sweetener and the associated process of manufacture. Whereas the Stimac reference is directed to an

environmentally friendly termite poison that happens to use a completely different fungus than the subject Application, the Mitchell reference is directed not to a poison at all but rather to a food product that happens to suggest the use of a sweetener composition that is formed with a subgroup of hydrolyzed starches having a Dextrose Equivalent up to about 25.

It is the Applicant's opinion that these two references are culled from disparate arts and thus there would be no motivation to combine these two references. A person seeking to find a termite poison would hardly look at a fruit concentrate sweetener; likewise a person interested in a fruit concentrate sweetener would hardly look to a reference directed to termite poison. The references do not seem appropriately combinable for 35 U.S.C. §103 purposes.

Furthermore, Stimac actually seems to teach away from the use of the fungus of the subject Patent Application, namely *M. anisopliae*, insofar as Stimac tried using that particular fungus but found it inadequate for the purposes of that invention. As stated in column 4, lines 13 – 18:

A field application of M. anisopliae resulted in recoveries of infected termites, but it did not eliminate the colonies. (Hansel and Watson 1983). While potential for microbial control is evident in the laboratory, efficacy under field conditions has generally been lacking.

Thus Stimac apparently rejects the use of *M. anisopliae*, the particular fungus used in the subject Application, as not being termiticidal. Rather, Stimac discloses and

claims the use of “a highly virulent *Beauveria bassiana* isolate to control termites.” (Column 4, lines 29 – 31). The Stimac reference does not teach or suggest the specific use of maltodextrin powder that is an element of the subject Application system; neither is the use of cornstarch or talc in the Stimac reference equivalent to the specific use of maltodextrin.

The Examiner is correct that there is some commonality of the objectives of the subject Application system with the “gist” of the Stimac invention; however, this is not specific enough. It is the Applicant’s opinion and belief that although the *gist* of the Stimac reference may be a general concern with preparing dry fungal spores to be used for the ‘control’ of some insect(s), a concern that is broadly shared by the present Subject Application system, the fact is that the Stimac reference is directed very specifically to the use of the particular fungus *Beauveria bassiana*, rather than, and in contradistinction with, the particular fungus of the subject Application system, *M. anisopliae*. It is impermissible to distill an invention down to just its ‘gist’ or ‘thrust’ in a manner that disregards the necessity and requirement of analyzing the subject matter as a whole (see MPEP § 2141.02.) The Stimac reference and the subject Application system diverge quickly as the analytical focus moves from an impermissibly broad overview to the more detailed comparison of the specifics of the disclosures and claims.

The Examiner further asserts that “...although the moisture content of the fungal spores of Stimac is not indicated, the dried spores remain viable and

effective when they are applied to insects.” The only insect species the Stimac reference is concerned with is termites. The overly broad assertion by the Examiner as regards the Stimac composition’s effectiveness against “insects” in general is presented without any substantiating evidence or documentation or references: Applicant respectfully challenges the Examiner to be so kind as to provide appropriate reference(s) to support this bald assertion.

The Examiner asserts that “... the artisan of ordinary skill would have recognized that the powder would have been desirably added to the spores *before or after* removal from the rice..” [emphasis added] It is not clear where the Examiner derives this assertion, that is, on what foundation in the prior art literature or references the assertion is based on. Furthermore, the desirability of adding the spores “...*before or after*...” the removal from the rice is equivocal and unhelpful, presupposing an undue amount of experimentation to determine which is best – “...*before or after*...” – for the particular ingredients and conditions used.

Applicant notes that the subject Application discloses and claims the use of a powder comprising a *water-soluble* maltodextrin. Neither the talc nor the cornstarch used by Stimac is sufficiently water soluble to be considered substantially equivalent to the “...water soluble maltodextrin” of the presently amended subject Application system.

It is respectfully noted that the Examiner seems to presume a function for maltodextrin that is narrower than the Applicant's. The Examiner points out that according to Mitchell, the maltodextrin prepared from starch is "a very good drying agent." Although the Applicant does, in part, use maltodextrin for its properties as a drying agent, its use as a preservative as well as its innate ability to facilitate the separation of spores from rice and thereby expedite the manufacture process, are other equally significant functional considerations that the Examiner has not acknowledged and will not find in the use of powders such as cornstarch or talc.

Mitchell includes in his invention the specific maltodextrin or other hydrolyzed starch according to its dextrose equivalent (D.E.), for the apparent reason that Mitchell is directed to a food product rather than to an insect poison. As such, Mitchell seems to teach away from the use of just any maltodextrin and specifies rather that subgroup of maltodextrins having a D.E. less than 25 or preferably 20, *not* because it has "superior drawing properties" as the Examiner notes, but because "it would be the most logical to use since it is more practical to remove *as little water as is absolutely necessary in the drying process ...*" (emphasis added). Mitchell further notes that maltodextrins having a D.E. less than 20 are characterized by "... poor dissolvability from the manufacturing standpoint [which] made its usage not only impractical but also non-economical." (Column 8, lines 18 – 25). Thus Mitchell is constrained to the use just of a

MR1683-510
Serial No.: 10/699,877
Response to Official Action dated 20 August 2004

maltodextrin made by starch hydrolysis and having a D.E. less than 20. The Applicant respectfully traverses the Examiner's assertion that it would have been obvious to use maltodextrin instead of starch for all of the reasons stated above, and believes the rejections have been successfully overcome by the currently amended Claims submitted herein and by the above remarks/arguments.

It is the Applicant's belief now that the present Subject Application in its currently amended form overcomes all of the rejections raised by the Examiner in the outstanding Office Action of 10 August 2004. It is the Applicant's further belief that the subject Application is now in condition for allowance, and such action is respectfully requested.

Respectfully submitted,
(For: ROSENBERG, KLEIN & LEE)

A handwritten signature in cursive script that reads "Harry Sernaker".

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